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In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The New York Law School Racial Justice Project ("the Racial Justice Project") is a legal advocacy organization dedicated to protecting the constitutional and civil rights of racial minorities. The Racial Justice Project seeks to increase public awareness of racism, racial injustice, and structural racial inequality in the areas of education, employment, political participation, and criminal justice. The Racial Justice Project has a continued interest in the development of jurisprudence that guards against racial discrimination and promotes a positive legal framework for addressing matters of civil and constitutional rights. Accordingly, the Racial Justice Project has a substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

Sixty-five years after Heman Marion Sweatt successfully challenged the University of Texas School of Law's refusal to admit Black students, most institutions of higher education embrace the fact that a racially and ethnically diverse student body improves the quality of education for all students. But today there remains a systemic racial

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

hierarchy that produces and perpetuates racial disparities in educational opportunities and outcomes. Race–conscious admissions programs, like the one used by the University of Texas at Austin ("UT Austin"), are designed to overcome some of these inequalities and serve as a vital pipeline to educational and professional opportunities for minority students.

This Court has unequivocally held that race–conscious admissions programs in public colleges and universities are constitutional, *see Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978), with benefits that flow to the educational institution, the larger society, and individual students. *See Grutter*, 539 U.S. at 343. Yet, opponents of race–conscious admissions programs and equal educational opportunities continue to argue against their legality and desirability. In this case, the overly rigid interpretation of the Equal Protection doctrine advanced by Petitioner runs counter to the letter, spirit, and logic of the Court's well-established jurisprudence.

Percentage plans, like the Top Ten Percent Plan used by UT Austin, alone cannot ensure meaningful diversity in the absence of supplemental race–conscious admissions programs. First, percentage plans often undermine the goals of diversity and integration by relying on continuing educational and residential segregation for their success. *See* Michelle Adams, *Isn't It Ironic?: The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729 (2001); U.S. COMMISSION ON

CIVIL RIGHTS, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002). Indeed, admission of a meaningful number of minority students occurs under percentage plans when high school students attend predominantly segregated, single-race schools and compete against each other for the top positions in their class. As this Court has acknowledged, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015). Reliance on percentage plans that trade on that very racial isolation undermine our struggle to become an integrated society.

Further, percentage plans acting alone are unlikely to achieve the broad diversity necessary to realize the educational benefits that flow from a diverse student body. A truly diverse student body can be achieved only by acknowledging the many characteristics that make each person and their experiences unique. This acknowledgment does not just include consideration of an applicant's race or ethnicity, but also the unique characteristics of each individual within a racial or ethnic minority group. Indeed, this Court has repeatedly counseled that any consideration of race in admissions programs must involve an assessment of each individual candidate. *Grutter*, 539 U.S. at 337. If admissions officers are to assess each candidate holistically, the Court should not force or encourage them to end their examination with a candidate's race. To do so would be akin to promoting a quota. Yet, in arguing that UT Austin should be foreclosed from considering

race as part of its holistic review because some level of racial diversity is achieved through the Texas Top Ten Percent Plan, Petitioner asks this Court to do just that. Such an approach to achieving student body diversity runs contrary to this Court's decisions on race–conscious admission programs and inhibits the ability of UT Austin to achieve intra–racial diversity that is critical to advancing many of the educational benefits the university.

Finally, this Court has long accepted that the educational mission of an American institution of higher learning goes far beyond the particular subject matter discussed in any single classroom, to encompass the goals of ensuring the availability of opportunities for all citizens, training students for leadership, and opening students' minds in an effort to create citizens who can collaborate, communicate and contribute meaningfully to an increasingly multi–ethnic and global community. *See, e.g.*, *Grutter*, 539 U.S. at 331; *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Indeed, minority students are not the sole intended beneficiaries of race–conscious admissions programs. The benefits of race–conscious admissions programs are substantial and inure to many segments of an educational institution and society.

ARGUMENT

I. Mandating that the University of Texas at Austin Rely Solely on the Top Ten Percent Plan is Problematic Because the

Plan is Premised on the Racial Segregation in Texas' Education System and Undermines Individualized Assessment.

In creating a diverse learning environment, universities are entitled to deference.[2] As this Court has observed in this very case, "[t]he District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, 'based on its experiences and expertise,'...that a diverse student body would serve its educational goals." *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013). The only issue here, therefore, is whether that individualized, holistic assessment should in any way include race. It should and it must.

A. The University of Texas at Austin's Diversity Program Must Include an Individualized Holistic Appraisal of Each Applicant in Order to Achieve its Compelling Interest in Creating a Racially Diverse Class.

Twelve years ago, in *Grutter*, a majority of this Court concluded that achieving diversity was a compelling governmental interest in the context of higher education. 539 U.S. at 325. The Court wrote that "attaining a diverse student body is at the heart of the University of Michigan Law School's proper

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[2] Academic freedom is not a specifically enumerated constitutional right, but it has been long viewed as a "special concern" of the First Amendment. *Bakke*, 438 U.S. at 312.

institutional mission." *Id.* at 329. This Court also approved the University of Michigan Law School's program on the grounds that it provided an individualized, holistic appraisal of each applicant, an appraisal that included but was not at all limited to race. *Id.* at 337. Indeed, the Court emphasized that "[t]he importance of this individualized consideration in the context of a race–conscious admissions program is paramount." *Id.* Justice Kennedy in his dissent faulted the law school's program, not because it sought diversity, including racial diversity, but because "a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process." *Id.* at 392 (Kennedy, J., dissenting). Today, UT Austin's diversity program is criticized *because* it takes race into account as part of an individualized, holistic appraisal of its applicants, a program that bears all the hallmarks of the program this Court approved in *Grutter*. *Id.* at 334.

The overwhelming majority of UT Austin's admissions decisions are not based on an individualized assessment of its students. Instead, the majority of UT Austin's admissions is determined by the Top Ten Percent Plan.[3] This

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[3] Today the Top Ten Percent Plan statute allows UT Austin to cap its admissions through the program at 75% of its "enrollment capacity designated for first-time resident undergraduate students in an academic year." Tex. Educ. Code Ann. § 51.803 (a-1) (2015). In 2008, however, when Ms. Fisher applied for admission, the University had no authority to cap Top Ten Percent plan admissions, and "81% of the seats available for Texas residents" went to students admitted

plan, enacted into law by the Texas legislature in response to the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), banning any use of race in admissions to the University of Texas School of Law. The plan seeks to maintain some level of diversity by providing, in essence, that every student who graduates from his or her high school in Texas in the top ten percent of the class is entitled to admission to public universities in Texas.

The Texas Top Ten Percent Plan produces some measure of diversity in college admissions by consciously relying on the fact that most high schools in Texas reflect the "racial isolation" that is an important part of "the harsh consequences of segregated housing patterns" in Texas.[4] *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525. This phenomenon is not limited to Texas; racial isolation persists in public schools across the country.[5]

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through the Top Ten Percent plan. *Fisher v. Univ. of Tex.*, 758 F.3d 633, 637 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

[4] According to the Texas Education Agency, in 2013–14, Latino and African American students accounted for 51.8% and 12.7% respectively of public high schools. Tex. Educ. Agency, *Enrollment in Texas Public Schools 2013–2014*, 7 (Nov. 2014).

[5] For example, New York has a dismal record on school segregation. John Kucsera & Gary Orfield, *New York State's Extreme School Segregation: Inequality, Inaction and a Damaged Future* (March 2014). "Only 20% of total school districts across the metro [area] were considered diverse in both 1999 and 2010." *Id.* at viii. Because "school and housing segregation [is] so inextricably linked" racial segregation persists because neighborhoods all over the state tend to be highly stratified. *Id.* at 21. These stratified neighborhoods

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment). As Justice Ginsburg has trenchantly observed: Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). Judge Higginbotham, writing for the majority in the Fifth Circuit, made the same point: "The sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system. The de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race." *Fisher v. Univ. of Tex.*, 758 F.3d 633, 650–51 (5th Cir. 2014) (footnote omitted).

Only with an understanding of the limitations of the Top Ten Percent Plan can we see the importance of the individualized program. The Top Ten Percent Plan is the opposite of an individualized review program; it assesses students on one and only one criterion—their class rank. That approach is hard to square with the dignity of the young men and women applying for consideration, and that is a cause for concern, for human dignity is integral to our constitutional order. *See Oyama v. California*, 332 U.S. 633, 663 (1948) ("The Constitution of the United States, as I read it, embodies the highest

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result in white and Asian children who "tend to end up in middle class schools with better opportunity, with African American and Latino students in schools of concentrated poverty with less prepared teachers, less competition and much weaker contacts with colleges." *Id.* at iv.

political ideals of which man is capable. It insists that our government, whether state or federal, shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin or the nature of his beliefs."), *See also* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV 65 (2011) (arguing that the right to dignity is intrinsic to our constitutional law). *C.f. Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015)

It has often been said that human dignity calls for respect for the individual, and a corollary of this proposition is that judgments between individuals should reflect individual differences. The Top Ten Percent Plan disregards this aspect of human dignity. If this were the end of Texas' admission process and there was no process of individualized, holistic review to complement the Top Ten Percent Plan, then UT Austin applicants would be automatically excluded from consideration for failure to graduate in the top ten percent of their high school classes. It would be fair to say then that these rejected applicants had been treated as a faceless mass, whose worth is summed up entirely in their inadequate class rank. They would, truly, have been reduced to a number.

None of this is meant to call for the dismantling of the Top Ten Percent Plan. This Court must begin from the perception, articulated in *Grutter*, that programs like the Top Ten Percent Plan, "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially

diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340.

B. The University of Texas at Austin's Individualized, Holistic Appraisal Must Include Race in Order to Achieve its Compelling Interest in Creating a Racially Diverse Class.

UT Austin's individualized holistic appraisal must include race for two critical reasons. First, honesty is important, in law and race–conscious admissions programs. For UT Austin to seek diversity, including racial diversity, without ever explicitly mentioning race is to obscure a wise public policy under the weight of evasion and euphemism.

Second, the idea of assessing individuals' contributions to a diverse student body without considering race is unjust. A person's identity is composed of many strands, and certainly is not limited to race. But, in this country, race often plays a critical role in individual identity and impacts an individual's views and perspectives. As this Court said in *Grutter*, "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." 539 U.S. at 333. The human experience is composed of all the characteristics of an individual applicant, including race.

It is worth emphasizing that the importance of diversity in no way turns on whether the students admitted through the holistic review process are academically stronger than their Top Ten Percent Plan counterparts. In fact, the Fifth Circuit has found that holistic review admittees do have significantly higher standardized test scores than the Top Ten Percent Plan students. *Fisher*, 758 F.3d at 650. The diversity issue is not how to get students with the highest test scores, or indeed how to get students with any single attribute, numerical or otherwise. *Id.* at 653. The challenge is how to generate a truly diverse student body and thus the strongest possible learning environment. If a university seeks this diversity, as UT Austin does, the only logical way of achieving it is to engage in a truly holistic, individualized review of the applicants to the school. For this critical goal, UT Austin's approach is precisely tailored.

II. The University of Texas at Austin's Limited Consideration of Race Helps to Achieve the Unique Educational Benefits That Flow from Intra-racial Diversity.

A. Intra-racial Diversity is Encompassed by a University's Compelling Interest in Attaining a Diverse Student Body.

At universities and colleges across the country, students contribute their unique experiences and perspectives to the robust exchange of ideas in their classrooms, dorm rooms,

extracurricular activities, and dining halls. A student's race is a critical component of his or her identity. In our country it is a characteristic that inescapably shapes our experiences. But it certainly is not the only characteristic that shapes us. That is one reason why UT Austin's consideration of race in its individualized, holistic review process is critical: it helps to achieve diversity within diversity, or intra–racial diversity, including people with a broad array of perspectives, experiences, and backgrounds within each group of racially diverse students.

Through its limited consideration of race and ethnicity in the admissions process, UT Austin seeks to create diverse classrooms that break down stereotypes, promote cross–racial understanding, prepare students for an increasingly diverse workforce and society, and train a diverse set of leaders. *See* Supplemental Joint Appendix at 4a. Intra–racial diversity is essential to the achievement of UT Austin's mission and a central component of a university's compelling interest in a diverse student body.

Recognizing UT Austin's constitutionally legitimate interest in creating a student body that is both racially and intra–racially diverse in no way requires a departure from this Court's precedent.[6]

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[6] Recognition of UT Austin's ability to achieve intra-racial diversity in pursuit of its articulated goals is also consistent with the deference afforded to colleges and universities. *See Fisher*, 133 S. Ct. at 2419 (reaffirming *Grutter*, which required that courts give "deference to the University's conclusion, based on its experience and expertise, that a diverse

The importance of intra–racial diversity has long been acknowledged by members of this Court. From *Bakke* to *Grutter* to *Parents Involved in Community Schools*, this Court has mandated that admissions officers focus "on each applicant as an individual, and not simply as a member of a particular racial group." *Parents Involved in Cmty. Schs.*, 551 U.S. at 722. In *Bakke*, Justice Powell stated that admissions officials should consider "the variety of points of view, backgrounds and experiences of blacks in the United States." 438 U.S. at 323. And, in *Grutter*, this Court found that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340.

Heeding this warning while adhering to this Court's precedents, UT Austin's race–conscious admissions program "consider[s] . . . each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity *within* and among all racial and ethnic groups," *Gratz v. Bollinger*, 539 U.S. 244, 277 (2003) (O'Connor, J., concurring) (emphasis added), and recognizes that diversity "encompasses a . . .broad[ ] array of qualifications and characteristics of which racial or ethnic origin is but a single though

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student body would serve its educational goals.") (citations and internal quotation marks omitted).

important element." *Grutter*, 539 U.S. at 325 (quoting *Bakke*, 438 U.S. at 315).

Preventing UT Austin from achieving intra-racial diversity would not only be inconsistent with precedent, but also undermine many of the acknowledged benefits of a racially diverse student body. For example, in *Grutter*, the Court determined that diversity in higher education was necessary to negate racial stereotypes. 539 U.S. at 330. Intra-racial diversity can "help disrupt negative stereotypes about race." Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1149 (2013). "The more intraracially diverse a university, the more diverse interactions students are likely to have with people from the same racial group. The more intraracially diverse interactions students have, the more likely those students are to repudiate or at least question their racial assumptions." *Id.* at 1164.[7]

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[7] The assumption that members of racial and ethnic groups share common experiences and backgrounds is, of course, wrong. For example, Black male students, "one of the most stereotyped groups on college and university campuses," at various universities and colleges were found to have significant differences in their styles of dress, speech, and cultural interests depending chiefly on whether they came from affluent, predominantly White neighborhoods or urban, predominantly minority neighborhoods. Shaun R. Harper, *Are They Not All the Same? Racial Heterogeneity Among Black Male Undergraduates*, 49 J. C. STUDENT DEV. 247, 247–269 (2008). In fact, same-race peers often hold stereotype beliefs about each other based on their preconceived notions about their peers' communities of origin, visual appearances, communication styles, and

Similarly, the Court encourages the robust exchange of ideas as another important benefit of a racially diverse student body. *Bakke*, 438 U.S. at 312 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"); *Grutter*, 539 U.S. at 332–33 ("Access to . . . [higher] education . . . must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."). Intra–racial diversity is critical to achieving that benefit. "The greater the intra–racial diversity, the greater the range of racial experiences. The greater the range of racial experiences, the greater the range of ideas." Carbado, *supra*, at 1164.

B. Reliance Solely on the Texas Top Ten Percent Plan to Achieve Racial Diversity Will Not Create Intra-Racial Diversity and Will Undermine the Educational Benefits That Flow From a Racially Diverse Student Body.

Because of pervasive racial segregation in Texas' public schools, the Top Ten Percent Plan cannot and will not produce the intra–racial

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opinions about their peers' activities, lifestyles, and affiliations. *Id.*

diversity UT Austin requires. Moreover, relying solely on the percentage plan for diversity will in fact undermine many of the established goals of achieving a diverse student body, particularly the ability to challenge and break down racial stereotypes.

Just last term, this Court had an opportunity to get a brief glimpse of the racially segregated housing patterns in Texas and found that "*de jure* residential segregation by race was declared unconstitutional almost a century ago . . . but its vestiges remain today, intertwined with the country's economic and social life." *Tex. Dept. of Hous. & Cmty. Affairs*, 135 S. Ct. at 2515. Texas high schools are also infamous for their racial segregation. Christopher B. Swanson, *High School Graduation in Texas Independent Research to Understand and Combat the Graduation Crisis*, 4 (Oct. 2006). Therefore, most of the racial minorities automatically admitted to UT Austin under the Top Ten Percent Plan come from intensely racially segregated high schools that are located in economically disadvantaged communities. In Texas, nearly half of public school students attend a school that is at least 80% non-White or 80% White. *See Fisher*, 758 F.3d at 650–653 (collecting various statistics documenting the "de facto segregation" of Texas public school system). *See also* Gary Orfield et al., *E Pluribus... Separation: Deepening Double Segregation for More Students*, THE CIVIL RIGHTS PROJECT 46–47 (2012) (showing based on data collected by the U.S. Department of Education that 52.7% of Latino public school students and 39.6% of Black public school students attend 90-100%

minority schools). As of 2013, 38% of all high schools in Texas were majority-minority schools. Julian Vasquez Heilig & Jennifer Jellison Holme, *Nearly 50 Years Post-Jim Crow: Persisting and Expansive School Segregation for African American, Latina/o, and ELL Students in Texas*, 45 EDUC. & URB. SOC'Y 609, 618 (2013). The paradigmatic example may be James Madison High School in Dallas, where 99.1% of its 454 students were non-white in the 2013-2014 school year. Tex. Educ. Agency, *2013-2014 Texas Academic Performance Report, James Madison High School*, 9 (2014). Further, 87% of its students were economically disadvantaged[8] and 72.7% of its students were "at-risk"[9] of dropping out. *Id.*

Then there is Jones High School in Houston, where 100% of its 441 students were non–White in the 2013-2014 school year. Tex. Educ. Agency, *2013–2014 Texas Academic Performance Report, Jones High School*, 10 (2014). Moreover, 85.3% of its students were economically disadvantaged and 77.3% were "at-risk." *Id.* Another example is Franklin D. Roosevelt High School in Dallas, where 99.7% of its 658 students were non–White, 88.3%

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[8] A student is economically disadvantaged when he or she is eligible for free or reduced lunch or other public assistance programs. Tex. Educ. Agency, Glossary for the 2013-14 Texas Academic Performance Report, 10 (2014).

[9] A student is "at-risk" when he or she is under 26 years old and fit one of many other criteria, including, for example: being on probation, parole, deferred prosecution, or conditional release; being pregnant or a parent; being homeless; having been expelled during the preceding or current school year; or having been placed in an alternative education program. *Id.* at 4–5.

were economically disadvantaged, and 76.1% were "at–risk" in the 2013–14 school year. Tex. Educ. Agency, *2013-2014 Texas Academic Performance Report, Franklin D. Roosevelt High School*, 9 (2014).

On the opposite end of the spectrum is Flower Mound High School in Flower Mound, a northern suburb of Dallas–Fort Worth. Of its 3,309 students in the 2013-2014 school year, only 3% were Black and 9.5% were Hispanic. Tex. Educ. Agency, *2013–2014 Texas Academic Performance Report, Flower Mound High School*, 10 (2014). Significantly, only 2.8% of its students were economically disadvantaged and only 12.6% were "at–risk." *Id.* These schools are just a few examples of a society that struggles to integrate, be inclusive, and exemplify diversity.

The Texas Top Ten Percent Plan was envisaged with this segregation in mind. *See, e.g.*, House Research Organization, Bill Analysis, H.B. 588, pp. 4–5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group."). Against this backdrop of racial segregation in Texas' public schools, the Top Ten Percent Plan largely admits racial and ethnic minorities who have attended predominantly single–race schools from low-income communities. *Fisher*, 758 F.3d at 650–51 ("[T]he strength of the Top Ten Percent Plan is also its weakness . . . . The de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race."). In contrast, the racially diverse students admitted

through UT Austin's holistic review process provide that "contribution[ ] to diversity beyond race" that is so essential to the school's educational goals. *See id.* As one scholar noted, "[o]ne common stereotype of Black and Latina/o students is that all students from these groups come from poor, inner–city backgrounds." Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 513 (2012). Accordingly, by admitting racial minority students from integrated schools, UT Austin's holistic review process helps to break down those stereotypes.

III. A Diverse Student Body Furthers the Goals of Higher Education and Has Lasting Benefits For the Collective Community.

The benefits of maintaining a diverse student body go far beyond the positive impact race–conscious admissions programs have on minority students. Assuring a diverse community in our colleges and universities has far–reaching and lasting benefits for all students who enroll, and even beyond the walls of the university. This Court has long recognized that the educational mission of American universities includes ensuring availability of opportunity for all citizens, training students for leadership, and opening students' minds in an effort to create citizens who can collaborate, communicate and contribute meaningfully to an increasingly global community. *Grutter*, 539 U.S. at 332. Students who graduate from universities with a

diverse student body are better prepared to navigate our country's increasingly global workplace, become more effective leaders, and contribute to the success of their industries and fields.

A. A Diverse Student Body Creates a Dynamic Learning Environment that Promotes Critical Thinking, Creativity, Innovation, and the Robust Exchange of Ideas.

There are many benefits to being educated in a diverse academic environment. For example, students who learn in a diverse environment are more likely to have improved skills in problem solving and group skills. Patrick T. Terenzini et al., *Racial and Ethnic Diversity in the Classroom: Does It Promote Student Learning?*, 72 J. HIGHER EDUC. 509, 512 (2001). Furthermore, the beneficial effects of diversity apparent in individual classrooms, can be "substantially magnified in the aggregate, when accumulated across the courses students take and across their out–of–class experiences in . . . diverse settings." *Id.* at 528.

A university that enrolls diverse students and cultivates a diverse learning environment will produce students who are more skilled in traversing a multicultural society. A racially and ethnically diverse learning environment also allows students to develop cultural competence and cross–racial understanding—skills that are essential both inside and outside the classroom. *See Grutter*, 539 U.S. at 330. With a diverse environment, "classroom discussion is livelier, more spirited, and simply more

enlightening and interesting" especially when "students have the greatest possible variety of backgrounds." *Id.* This educational environment also helps break down stereotypes and encourages students to question and challenge long–held beliefs. *See Grutter*, 539 U.S. at 330 (noting that a diverse student body "promotes cross–racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races"); *Bakke*, 438 U.S. at 312–13 ("The atmosphere of speculation, experiment and creation—so essential to the quality of higher education . . . . [requires] exposure to the ideas and mores of students as diverse as this Nation of many peoples") (internal quotation marks omitted). Therefore, the "more interaction one has with others who hold different views, or the more one learns about various aspects of human diversity, the more likely it is that one will be challenged to think and respond in novel ways." Paul D. Umbach & George D. Kuh, *Student Experiences with Diversity at Liberal Arts Colleges: Another Claim for Distinctiveness*, 77 J. HIGHER EDUC. 169, 172 (2006). *See also* American Council on Education et al., *Does Diversity Make a Difference?* 69 (2000) (finding that a diverse classroom will "challenge students' stereotypes, broaden their perspectives, and stimulate critical thinking.").

B. A Diverse Student Body Prepares All Students to Succeed as Engaged Members of Their Community.

The benefits of diversity do not end in the classroom; a diverse learning environment also helps to prepare graduates to succeed as professionals in

the global workplace. As our country has become increasingly diverse, and as technology has allowed instant global communication and networking, universities have recognized their obligation to prepare their graduates to succeed in this "global workplace." American Council on Education, *supra*, at 67. ("[T]he combination of student interaction, curricular diversity, and structural diversity create[s] educational possibilities not present in classes without these conditions."). Diversity gives all students the opportunity to develop essential interpersonal skills in order to work with the diverse co-workers, clients, and supervisors they will inevitably encounter after graduation. *See* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 335 (2002) (emphasizing that diversity in higher education allows students "to undergo cognitive growth" because it is during this time that classroom and social relationships discrepant from students' home environments become especially important in fostering cognitive growth"). A study by the American Council on Education and American Association of University Professors concluded, "simple social interaction—regardless of discipline—teaches students how to relate to one another across personal differences; such interaction alone can challenge stereotypes and better prepare students to interact with people different from themselves in the workplace and in society." American Council on Education, *supra*, at 67.

To assure success in the global workplace, students of all backgrounds must be able "to perceive

differences both within groups and between groups," Gurin et al., *supra*, at 360, in order to be effective leaders who can "anticipate and respond with sensitivity to the needs and cultural differences of highly diverse customers, colleagues, employees, and global business partners." *Id.* at 361. Diversity in the college classroom provides each student with the valuable opportunity to develop these skills.

In addition to preparing graduates to be successful professionals, a diverse learning environment also prepares graduates to be informed, engaged members of our civic and political community. To prepare graduates with the knowledge, skills, and values necessary to be an informed community member, universities must provide them with a platform where they can form values that are sensitive to the needs of a diverse community. *Grutter*, 539 U.S. at 330. Universities increasingly understand the importance of educating students to be positive members of society and realize that by diversifying their student body they are enabling students to cultivate necessary civic virtues. Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 27 (2005).

C. A Diverse Student Body Assures That Our Future Leaders Will Better Reflect Our Country's Rich Diversity.

This Court has long recognized that universities "represent the training ground" for our

nation's leaders. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). As our country grows increasingly diverse, its leaders must reflect this rich diversity. As this Court explained:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Grutter, 539 U.S. at 332.

Assuring that our leaders reflect our country's rich and growing diversity is an essential step towards achieving equal opportunity and breaking down stereotypes. In order to assure that members of historically disadvantaged communities have every opportunity to succeed, our universities must uphold their role as the training ground for leaders who reflect our diverse population.

In addition to assuring equal opportunity for individual graduates, achieving diversity in educational institutions has broad practical implications across society for assuring diversity in leadership positions. The infusion of diverse voices and experiences into decision–making processes ensures a sense of cultural competency and effectiveness, creating a "savvy, multicultural ability

to lead across difference." Research Center for Leadership in Action, *Leadership, Diversity and Inclusion: Insights from Scholarship* 13 (2011). As this study concludes, "working across difference is a core leadership task and getting diversity right—not just as the token representation of people, but a welcoming of each person's unique contributions—makes for a more adaptable and nimble organization in the face of today's complex world." *Id.* at 24.

Indeed, this capacity for leadership is demonstrated in the success of companies that are run by diverse management teams. A 2014 study found that companies with diverse management perform better financially. *See* Vivian Hunt, et al., *Diversity Matters*, MCKINSEY & COMPANY, 1–3 (2014). The study examined 366 companies in different industries in the United States, United Kingdom, Canada, and Latin America and discovered that the companies in the top 25% for racial and ethnic diversity were more likely to see financial returns of 30% more than the industry medians. *Id.* at 3. In the United States specifically, the study found that there was a linear relationship between better financial performance and racial and ethnic diversity. *Id.* at 1.

A 2013 study by the *Harvard Business Review* found that companies with both inherent and acquired diversity[10] were 45% more likely to report a

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[10] The study defines inherent diversity as that which "involves traits [one was] born with, such as gender, ethnicity, and sexual orientation." According to the study, acquired diversity "involves traits [one] gain[s] from experience" such as

market share growth on the previous year, and 70% more likely to report they have captured a new market. Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV., Dec. 2013 at 30. Additionally, these companies were out–innovating and out–performing their less diverse peer companies. *Id.* The study concluded, "[l]eaders also need acquired diversity to establish a culture in which all employees feel free to contribute ideas. . . . Leaders who give diverse voices equal airtime are nearly twice as likely as others to unleash value–driving insights." *Id.*

IV. University of Texas at Austin's Consideration of Race in its Individualized, Holistic Review is Carefully Nuanced and Circumscribed.

For UT Austin race is a factor of a factor of a factor. As meticulously described by Judge Higginbotham, the university's

> [h]olistic review considers applicants' [Academic Index] scores and Personal Achievement Index ("PAI") scores. The PAI is calculated from (i) the weighted average score received for each of two required essays and (ii) a personal achievement score based on a holistic review of the entire application, with

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working in another country or selling to diverse consumers. Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV., Dec. 2013 at 30.

> slightly more weight being placed on the latter. In calculating the personal achievement score, the staff member conducts a holistic review of the contents of the applicant's entire file, including demonstrated leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the applicant's socioeconomic status, family composition, special family responsibilities, the socioeconomic status of the applicant's high school, and race. No numerical value is ever assigned to any of the components of personal achievement scores, and because race is a factor considered in the unique context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student.

Fisher, 758 F.3d at 638 (footnotes omitted).

It is beyond question that this delicately contoured consideration of race comports with *Grutter*'s "requirement of individualized consideration." *Grutter*, 539 U.S. at 336. Like the University of Michigan Law School, UT Austin "considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race." *Id.* at 340.

This process hardly deserves to be called a classification by race. UT Austin does not identify students by race and then reserve certain seats in the class solely for people of particular races, as was the case in *Bakke*. *Id.* at 274. Nor does UT Austin use race as a tie–breaker, saying that if people are otherwise comparable, those of a particular race will be admitted. *See Grutter*, 539 U.S. at 387–389 (Kennedy, J., dissenting). Instead, UT Austin classifies its applicants on a complex, multi-factor grid. Following Judge Higginbotham's exposition of the factors that go into the Personal Achievement Index, one could only say that a student has been *classified* as a person with above-average test scores, a class rank in the top twenty percent, a thoughtful but imperfectly organized essay, strong leadership qualities, extensive extracurricular involvement in music, and who is Hispanic, from a low-income household, and a two-parent family. And once this Personal Achievement Index score has been computed and the array of components has been compiled into a grid—which consists simply of numerical scores and not of the underlying factors, such as race—the final decision to admit or reject is made with no regard to race. *Fisher*, 758 F.3d at 638–39; Brief in Opposition at 7–8. This system does not have the vices that this Court has sought to root out in cases of blunt racial classification, and its differences mark it as constitutional.

Strict scrutiny, as this Court observed in its earlier opinion in this case, "must not be strict in theory but feeble in fact." *Fisher*, 133 S. Ct. at 2421. But equally it must not be "strict in theory, but fatal

in fact." *Id.* (quoting *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 237 (1995)). Here the University of Texas has carefully shaped a program of individualized, holistic consideration of its students with respect to a wide range of factors, including but not at all limited to race. That is what the *Grutter* majority believed the University of Michigan Law School had done; it is also what Justice Kennedy believed the University of Michigan *should* have done. The University's carefully calibrated and narrowly tailored effort to achieve diversity for its student body deserves this Court's approval.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully Submitted,

/s/
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